Seminole Nation of Oklahoma

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Federal Communications Commission
445 12th Street. S.W.
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Chairman Pai,

On behalf of the Seminole Nation of Oklahoma, I would like to encourage the FCC to have meaningful consultations with Indian Nations concerning WT Docket No. 17-79. The Seminole Nation of Oklahoma's response to Docket No. 17-79 is attached for your review.

Further information concerning the attached response contact the Seminole Nation Executive Office at 405-257-7200.

Respectfully,

Lewis J. Johnson
Assistant Chief
Seminole Nation of Oklahoma

In the Matter of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	WT Docket No. 17-79
Revising the Historic Preservation Review Process for Small Facility Deployments	WT Docket No. 15-180

Comments of the Seminole Nation of Oklahoma

June 15, 2017

The Seminole Nation of Oklahoma works with a variety of federal, state, and local agencies on small and large projects in the compliance with federal, state, and local laws, including but not limited to, the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). The Tribe protects irreplaceable sites and locations that are of religious and cultural significance to our people today by continuing the successful collaborative processes that have been established with federal agencies, other Indian tribes, and project developers.

The Federal Communications Commission (FCC) claims that wireless broadband needs and 5G deployment create "an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law. Commission processes, local and State reviews, or otherwise." The FCC seems to assert that the wireless industry has an inherent right to deploy equipment and facilities wherever they desire and without regard to existing environmental or cultural compliance laws and regulations.

The Tribe is pleased that the FCC acknowledges that the proposed changes "might significantly or uniquely affect Tribal governments, their land and resources." Impacts to Tribal resources include ancestral archaeological sites, sacred sites, and traditional cultural properties. The FCC has a trust responsibility to the Tribe to identify these resources and to consider them in their decision making process.

The FCC needs to have meaningful consultation with Indian nations, including the Tribe, to help explain the proposed rules and the technological advances that are driving the proposals. At this point, the Tribe is unclear what exactly wireless industry and the FCC mean by "small cell" or "5G" deployment. The definitions provided by the wireless industry seem to vary depending on the audience and the proposed

undertaking. The FCC definitions are more consistent but do not match completely any of the definitions given by industry. Unless there is a common, consistent definition, miscommunication and resulting frustrations will continue and will inevitably slow the approval process for small cell and 5G deployments.

The FCC's Tower Construction Notification System (TCNS) has proven to be a very useful tool to track, monitor, and expedite the placement of cellular technology infrastructure. Over the past 10 years, we have worked with and developed quality relationships with the many consultants installing telecommunication infrastructure facilities, including cell tower siting, through the TCNS program. The Tribe provides prompt response to cell tower notifications. If and when any situations arise using the TCNS program, tribes have been able to promptly contact industry consultants and/or FCC staff to expedite resolutions. With the emerging 5G technology by the wireless telecommunications industry, the Tribe can see the benefits of modernizing the existing TCNS to meet our needs. The Tribe's initial comments are set forth below, although the Tribe may provide follow-up comments and comment on other proposals.

A. Streamlining State and Local Review

1. "Deemed Granted" Remedy for Missing Shot Clock Deadlines

The Tribe does not believe a "deemed granted" remedy is necessary. We have always performed our cultural assessments in a timely manner and have never intentionally held up a project. While we can usually get our assessments completed within 30 days, there should be an avenue, if the parties are engaged and working together, to complete the project after that time, if the parties agree.

Wireless providers should give the tribes the complete package of necessary information as early as possible, before beginning to let the shot clock start to run. Adequate time needs to be given to complete any necessary surveys or reviews. Of the three options provided in paragraphs 9 through 14, the only option we believe would be helpful to the process is to change the rebuttable presumption—that the deadlines are reasonable—to an irrefutable presumption for a failure to act within the timeframe. Finding a local government in non-compliance or deeming their authority to lapse at the expiration of the shot clock is unnecessary. Again, getting the complete package is essential for the starting of the shot clock, and the ability to complete the assessment, even after the shot clock expires, is necessary and reasonable.

2. Reasonable Period of Time to Act on Applications

The Tribe agrees that some structures need more scrutiny than others. Taking things such as: height, proximity to other towers, whether the structure would be located in residential, commercial or industrial areas, whether the project is a collocation project, the size of the equipment, and other factors all contribute to concerns of a local government. Developing a time line that allows for more time for more complex projects seems reasonable.

B. Reexamining NHFA and NEPA Review

1. Background

The Tribe strongly believes that NHFA and NEPA review are essential for Indian tribes. Rather than looking at tribal involvement as simply paying them as contractors to do cultural assessment work, the

FCC should be acknowledging the sovereignty of Indian tribes. Tribes are not just contractors hired to do the cultural assessment work, they are governments looking out for the health and safety of their people and the protection of their lands and resources.

If, after reviewing the initial documentation the tribal technical staff believe that the proposed locations have potential to impact historic properties, we request archaeological and/or ethnographic reviews. Project proponents have contracted with both outside archaeologists and Tribal staff to complete archaeological reviews. The Tribe expects project proponents to contract with the Tribe to complete any needed ethnographic studies, as the Tribe is the only entity with the expertise to both identify ethnographic resources and evaluate their significance to the Tribal community.

The fees for these reviews cover the Tribe's actual costs for conducting the research, including professional staff time for research and reporting, honoraria for Tribal elders and informants, supplies, any travel expenses, and modest overhead applied to all contracts and grants. In FY 2017, the Tribe's indirect rate is set at 26.75%.

2. Updating Our Approach to the NHPA and NEPA

a. Need for Action

The Tribe does not demand payment for these study services up front. Some projects are more complex or in closer proximity to known archeological or ethnographically significant sites. However, we do monitor on-going maintenance and other activity, even if the equipment is installed on an existing structure. Payment is negotiated as contractor at that time.

As stated earlier, the existing TCNS has been working well for the Tribe. We are notified in most cases, in compliance with the NHPA, and we provide timely responses to the TCNS notification. Once communication is established, the Tribal staff keeps in regular contact with the applicant. The Tribe understands the need to keep the project on track, and we work hard and diligently to get our assessment work done in a timely manner. In our area, we have not had the problem of having multiple tribes claim interests in the area, nor have we experienced issues with our assessments being "cumbersome and costly." Applicants should not be able to circumvent these very necessary cultural assessments when they are making the decision to build the structure on tribal lands or within a site held sacred by the Tribe. These types of interactions are simply part of doing business in Indian country. For the FCC to ignore tribal concerns on their own homelands would be paternalistic and disrespectful.

Contrary to claims that cell towers rarely impact historic properties, the Tribe has identified numerous existing communication towers built on traditional cultural properties without consultation. The Tribe has worked diligently with the wireless industry to mitigate for existing or replacement towers on traditional cultural properties or newly proposed towers.

b. Process Reforms

i. Tribal Fees

This section misrepresents the reason tribes are involved in these processes. The tribes are involved because these structures are being built through tribal lands and across tribal sacred sites. Yes, tribes should be paid fees for the work they perform on cultural assessments, but the FCC should focus on

ensuring that tribes are in a position to authorize or not authorize a particular project, rather than on whether costs are consistent.

ii. Other NHPA Process Issues

The Tribe strongly opposes any effort to allow applicants to "self-certify their compliance with Section 106.'" The FCC staff notes within this document that "on numerous occasions that applicants have failed to perform their Tribal notifications as our processes require." Because of this issue, we believe that the FCC needs to have oversight over the Section 106 process for applicants.

c. NHPA Exclusions for Small Facilities

i. Pole Replacements

The Tribe believes that notification is necessary whenever a business will be replacing their poles within their homelands. If the construction and excavation expands the boundaries of the original site at all, the replacement tower project must go through the NEPA process.

ii. Rights-of-Way

Likewise, the Tribe does not agree that expansion of a right-of-way should be excluded from the NHPA process, if the right-of-way is expanded in any way. This document uses the phrase "the current right of way exclusion applies only if (1) the construction does not involve a substantial increase in size over nearby structures...". This phrase is too general. What does "substantial" mean? And, what does "nearby" mean? Ignoring the historic property aspects of the area would be ignoring the government-to-government obligation of the federal government to consult with tribes on such projects.

iii. Collocations

The purpose of the requirement of a Section 106 review for projects within 250 feet of the boundary of a historic district is that many of the sacred sites chosen by applicants are located on the highest geographical landmark in a particular area. These landmarks are significant to Indian tribes and have been significant for thousands of years. When additional equipment is being attached to these towers, tribes in the area should be notified and have adequate time to comment on this action. The Tribe is troubled that the tribal assessments seem to be the target of these proposed rules. We strongly urge the FCC to consult with tribes individually before adopting any new rules that would limit their role.

d. Scope and Undertaking and Action

The Tribe strongly supports the FCC's continued role in ensuring environmental compliance on all of these proposed projects. We do not believe that site specific licenses should be distinguished from geographic area licenses.

3. Collocations on Twilight Towers

The Tribe does not believe that twilight tower owners/renters should be given a free pass when there has been no determination of adverse effects. The phrase "streamlined process"'" seems to be targeted at tribal cultural review, so we do not believe any streamlined process should be developed without consultation and careful consideration by Indian tribes.

CONCLUSION

We urge the FCC to conduct government-go-government consultation with all tribes that may be impacted by this effort to streamline the cell tower infrastructure process. The Tribe reserves the right to submit additional comments as necessary.

Lewis J. Johnson
Assistant Chief
Seminole Nation of Oklahoma

SEMINOLE NATION RESPONSE TO FCC NPRC 17-79 – FINAL

Introduction

Seminole Nation of Oklahoma (SNO) submits these comments on the Draft Notice of Proposed Rulemaking (DNPRM) and Notice of Inquiry in the Matter of Accelerating Wireless Broadband Deployment by Removing Barrier to Infrastructure Investment (WT 17-79) and Revising the Historic Preservation Review Process for Wireless Facility Deployments (WT 15-180).

The Federal Communications Commission (FCC or The Commission) has a history of working collaboratively with Tribal Nations, as the federal trustee to 567 Tribal Nations in the area of telecommunications. This collaboration has included its obligation to protect Tribal historic properties and cultural resources. The FCC has been a model example of how government agencies can develop Best Practices with Seminole Nation of Oklahoma (SNO) to facilitate infrastructure development while continuing to uphold the government's trust responsibility to Seminole Nation of Oklahoma (SNO) as well as the government's statutory obligations to protect historic properties and cultural resources.

Seminole Nation of Oklahoma (SNO) urges the Commission to continue this leadership in working with Tribal Governments and Tribal Historic Preservation Officers to protect cultural resources, human remains and historic properties.

Seminole Nation of Oklahoma (SNO) understands the need for discussions on streamlining buildout of small cell infrastructure. As advocates for underserved populations, we are encouraged by the FCC's emphasis on expanding broadband to Indian Country tribal citizens. However, as the original stewards of the land and as sovereigns, we insist that deployment must be done without impact to Tribal cultural resources. The Tower Construction Notification System (TCNS) was implemented for that very reason. The TCNS has been a model for how the federal government, Seminole Nation of Oklahoma (SNO) and industry can work together in a meaningful way that encourages infrastructure development while respecting tribal sovereignty.

We would like to remind the Commission of its trust responsibility and duty to recognize Seminole Nation of Oklahoma (SNO) as sovereign. This trust responsibility is derived from the United States Constitution, federal statutes, and legal decisions which outline the government-to-government relationship between Seminole Nation of Oklahoma (SNO) and the federal government. For the past five decades, every presidential administration has adhered to policies supporting Tribal self-determination. In addition to recognizing Tribal sovereignty and upholding Tribal treaty rights, Federal agencies have a legal duty to fully respect and abide by the Federal trust responsibility to Seminole Nation of Oklahoma (SNO) and Indian people. Critical to this responsibility is acting in the best interests of Tribal Nations, as determined by the Seminole Nation of Oklahoma (SNO) themselves. Obtaining consent for Federal actions that affect tribes is the clearest way to uphold

the trust responsibility and Tribal sovereignty. The FCC's TCNS is a visionary process that continues to uphold the Commission's trust responsibility while creating efficiency when facilitating infrastructure deployment. We underscore its continued utility and urge its preservation.

There are 567 federally recognized Seminole Nation of Oklahoma (SNO) in the United States, all with distinct government, cultures, histories, landholdings, and citizens. The historic preservation priorities of one Tribal Nation cannot be assumed to be the same of another. This is why it is imperative for the FCC and applicants to treat individual Seminole Nation of Oklahoma (SNO) as the individual sovereigns they are in all aspects of deployment: application review, historic property interest discussions, site visits, site monitoring and final completion. The TCNS process provides an opportunity for each Tribal Nation affected by the deployment of wireless technology to assess proposed sites directly to the wireless industry. It also provides a thorough, functional solution to the FCC's obligation to consult individually.

When the Commission considers timeframes, fee schedules and changes to areas of interest, it should consider the views of individual Seminole Nation of Oklahoma (SNO) on changes to a system that would impact them greatly. We invite the Commission to release possible remedies and solution to timeframes, fee schedules and changing areas of interest that would be the subject of Tribal Government to Government Consultation on this subject.

Statement on Future Action Posed in the Draft Notice of Proposed Rulemaking

Seminole Nation of Oklahoma (SNO) is deeply concerned with the proposed policy changes contained in the DNPRM. Not only do these changes have the potential to harm a largely functional and streamlined tribal review process that preserves tribal culture resources, they run counter to the intent of various laws, including the National Historic Preservation Act (NHPA), The National Environmental Protection Act (NEPA) and the Native American Graves Protection and Repatriation Act (NAGPRA). Furthermore, much of what the DNPRM seeks to address can be found in existing FCC documents, including the USET Voluntary Best Practices. Seminole Nation of Oklahoma (SNO) strongly urges the Federal Communications Commission not to proceed with this draft Notice of Proposed Rulemaking and to avoid taking further action on these dockets.

In the event that the Commission does move forward with this Draft Notice of Proposed Rulemaking, the Commission must conduct government-to-government consultation with Seminole Nation of Oklahoma (SNO). It is the Commission's obligation to the United States to consult on any major changes to federal government processes that impact Tribal Nations. Thus

far, the Commission has not conducted consultation in any form with Seminole Nation of Oklahoma (SNO) on this topic.

Prior Intensive Consultations between the FCC and USET, with Industry involvement, have addressed in detail all of the issues presented in this NPRM.

It must be emphasized that the issues presented in the NPRM are not new. Rather, they have been discussed among the interested parties for years and led to very substantial understandings and agreements that have provided guidance to the FCC, Seminole Nation of Oklahoma (SNO) and Industry. For example, the USET-FCC Best Practices, which were adopted on October 24, 2004, provide comprehensive recommendations for a process that would provide certainty to Industry while protecting Tribal sacred sites ("Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act"). In the most recent discussions, USET submitted to the FCC and Industry a document that expressly set forth the substantial overlap between the Best Practices and the four principles that Industry representatives had proposed for a "revised" historic review process ("Assessing Commonalities Between the Principles Proposed by Industry and the USET-FCC Best Practices," January 18, 2017). These Best Practices may be specific to USET, but they are illustrative of what is possible when the parties work together.

Further, by memorandum dated March 27, 2017, after conducting internal consultations, USET SPF specifically responded to each of the four Industry principles ("Response to Industry Proposed Principles"). In virtually every case, USET SPF was largely in agreement with Industry on the main principles. However, USET SPF also noted that there are practical considerations that are necessary to make certain suggestions work. For example, Industry proposed a 30-day deadline for Tribal Nations to respond to an application. USET SPF agrees with that proposal, but disagrees with Industry on when the clock starts to run. USET SPF strongly believes that the clock should only begin once all the information necessary for a Tribal Nation to make a determination of impact has been provided by Industry.

Seminole Nation of Oklahoma (SNO) confirms this same finding. Too often, Industry representatives send deficient information which prevents us from beginning a comprehensive and thorough review of an application. Going further, USET SPF supported that Seminole Nation of Oklahoma (SNO) should identify the information they need through the TCNS. In doing this, Industry would know in advance exactly what they need to send. Industry has argued that the clock should start to run with the delivery of any notice to a Tribal Nation and that if the Tribal Nation seeks additional information that the deadline would be tolled until the additional

information is delivered, but that the 30-day deadline would be shortened by the time that had already passed from the first notice.

Notwithstanding this past work, all the parties acknowledge that given the nature of the next generation of technologies it is important to revisit prior understandings and make appropriate adjustments to continue to assure that sacred sites are protected even as we advance a telecommunications infrastructure that everyone supports.

Tribal Consultation on the DNPRM

The Draft Notice of Proposed Rulemaking directs the FCC Office of Native Affairs and Policy (FCC ONAP) to conduct government-to-government consultation on this matter. We are encouraged that the FCC recognizes its obligation to consult with Seminole Nation of Oklahoma (SNO) when considering policy that will greatly impact their governments and historic and cultural properties. Should the Commission vote to proceed with this rulemaking, FCC ONAP should immediately begin the process of meaningful Tribal consultation.

As a part of the FCC's consultation obligations, detailed statistics and information should be made available to Seminole Nation of Oklahoma (SNO) immediately in preparation for meetings or other consultation processes.

Many of the questions posed in the DNPRM regarding tribal involvement can be easily answered through direct, government-to-government consultation between two sovereigns. As trustee to 567 Tribal Nations, the FCC has an obligation to obtain guidance from Seminole Nation of Oklahoma (SNO) on the impacts that policy changes might have on cultural and historic resources protected for the Seminole Nation of Oklahoma (SNO) by statute.

When preparing to consult on any subsequent Notice of Proposed Rulemaking, we recommend that the Commission prioritize the following: face-to-face dialogue with Tribal Leaders and providing opportunity for input from Seminole Nation of Oklahoma (SNO), comments are received from geographically diverse representation of Tribal Nations; and including and acknowledging the history of removal from original homelands experienced by many Tribal Nations.

The FCC will have a productive consultation with Tribal Nations if they are able to reach as many Tribal Leaders, cultural leaders and TCNS experts as possible, in person. Not only will a robust consultation period with Indian Country satisfy the Commission's consultation obligations, it will provide insight and input on these complex processes that the Commission seeks comment.

Further, if this DNPRM is driven by what is termed "bad actors" on the tribal side as determined by the National Programmatic Agreement, the Commission is obligated to consult directly with said Tribal Nation to resolve differences and should not invoke a DNPRM to address specific situations. A radical change to policy, as a reaction to the conduct of a small number of Tribal Nations, is contrary to the FCC's trust responsibility to act in the best interests of ALL Tribal Nations. We urge the Commission to consider the distinct needs and opinions of all Tribal Nations through proper government-to-government consultation before taking any official action.

The Lack of Broadband Access in Indian Country

The mission of the FCC is to regulate interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. The FCC has fallen short on this mission as it relates to Indian Country and we can do better. Advanced telecommunications infrastructure has not been made available as far as possible to Seminole Nation of Oklahoma (SNO) on Tribal lands. The FCC acknowledged this in the 2016 Broadband Progress Report that stated that 41% of all Tribal Lands and 68% of Rural Tribal Lands lack access to Broadband. An estimated 1.5 million people on tribal lands lack access, and are consequently left out of the internet economy, left out of online educational resources, left out of telehealth opportunities and online medical care and without proper public safety telecommunications infrastructure.

When considering 5G deployment, the Commission must prioritize connecting Indian Country. Small cells have the potential to bring slow wireless speeds on reservations to broadband level speeds, allowing for the Commission to achieve more broadband deployment on Tribal Lands. Incentivizing Industry to deploy small cells in Indian Country is in line with the authorizing mission of the Commission.

However, Seminole Nation of Oklahoma (SNO) has deep concerns with the deployment of telecommunications infrastructure as it relates to preserving historic properties and sacred sites. Communications infrastructure deployment, on Tribal lands or otherwise, cannot come at the expense of Tribal sovereignty, consultation, sacred sites, or cultural resources. The Commission has a trust obligation to consult with Seminole Nation of Oklahoma (SNO) and to protect the historic properties designated under the National Historic Preservation Act. This statutory obligation must be a governing principle as the FCC seeks expanded wireless deployment.

SEMINOLE NATION RESPONSE TO FCC NPRC 17-79 – FINAL

Background on Tribal Sovereignty and the FCC's Relationship with Indian Tribal Nations

Recognition of Tribal Sovereignty

Seminole Nation of Oklahoma (SNO) is a sovereign government pre-dating the United States and retaining the right to govern their own peoples and lands. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1] (Nell Jessup Newton ed., 2012) (discussing the independent origin of Tribal Nations' sovereignty, which forms the foundation of the exercise of modern powers of Tribal governments). As Chief Justice John Marshall recognized in *Worcester v. Georgia*, "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights." 31 U.S. 515, 559 (1832). Additionally, the United States Constitution recognizes the status of Tribal Nations as sovereign governments. U.S. CONST., art. I, § 8, cl. 3. Tribal Nations' inherent sovereignty empowers them to govern their own citizens and territories, and they retain their lands and sovereign powers unless explicitly ceded through treaties or abrogated by statute. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999).

Tribal Nations, therefore, are not merely another "stakeholder" or "special interest" in infrastructure permitting processes. Rather, Seminole Nation of Oklahoma (SNO) exercises jurisdiction over their retained lands and resources, both on and off the reservation. Federal permitting agencies nonetheless tend to treat Seminole Nation of Oklahoma (SNO) as members of the public, entitled to only limited information and the ability to submit comments, rather than incorporating them into decision-making processes as non-Federal governmental entities. This is inappropriate and contrary to long-recognized Tribal sovereign rights. Additional policy guidance should emphasize the United States' substantive legal responsibilities to Seminole Nation of Oklahoma (SNO) and meaningful and effective consultation as a required activity to ensure consideration and accommodation of these substantive rights.

Compliance with the Federal Trust Responsibility and Tribal Consent

The Federal trust responsibility has its roots in land cessions made by Seminole Nation of Oklahoma (SNO) and in the promises made by the United States to protect the rights of Seminole Nation of Oklahoma (SNO) to govern themselves. The principles of the trust responsibility were expounded in early Supreme Court decisions and remain foundational today. As Justice Marshall recognized in *Worcester v. Georgia*, the treaty with the Cherokee "explicitly recogniz[ed] the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection." 31 U.S. 515, 556 (1832).

Subsequent case law has confirmed that the trust doctrine includes fiduciary obligations for the management of trust lands and natural resources, including the duties to act with good faith and loyalty. The courts have also consistently rejected arguments that the government's conduct in its administration of the trust can be tested simply by a standard of reasonableness, and they have instead required that the government meet the higher standards applicable to private trustees. The vast body of case law which recognizes this trustee obligation is complemented by the detailed statutory scheme for protection of Indian affairs set forth in Title 25 of the United States Code. In fact, "[n]early every piece of modern legislation dealing with Indian Tribal Nations contains a statement reaffirming the trust relationship between Seminole Nation of Oklahoma (SNO) and the federal government." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton ed., 2012). Federal policy must be uniform and explicitly acknowledge that the Federal trust responsibility—as recognized by the courts, Congress, and the Executive—runs across all branches of government, and each agency is responsible for upholding the United States' unique obligations to Tribal Nations.

In addition to recognizing Tribal sovereignty and upholding Tribal treaty rights, Federal agencies have a duty to fully respect and abide by the Federal trust responsibility to Seminole Nation of Oklahoma (SNO) and Indian people. Critical to this responsibility is acting in the best interests of Tribal Nations, as determined by them. Obtaining Tribal consent for Federal actions that affect them is the clearest way to uphold the trust responsibility.

Upholding Statutory Obligations to Seminole Nation of Oklahoma

In carrying out its obligations and responsibilities to substantively and effectively include Seminole Nation of Oklahoma (SNO) in infrastructure permitting and development, the Federal government must also adhere to its duties under various environmental, historic, and cultural protection statutes. These statutes stand as congressional declarations of the United States' responsibilities not only to the environment and other resources, but to Tribal governments as well. In concert with the trust, treaty, and consent provisions outlined above, the Federal government must look to statutes to guide its actions with respect to Tribal Nations.

Statutory obligations include those in the National Historic Preservation Act (NHPA); National Environmental Policy Act; Clean Air Act (CAA); Clean Water Act (CWA); Rivers and Harbors Act (RHA); Mineral Leasing Act (MLA); Native American Graves Protection and Repatriation Act (NAGPRA); American Indian Religious Freedom Act (AIRFA); Archaeological Resources Protection Act (ARPA); and other federal laws.

National Historic Preservation Act

The National Historic Preservation Act (NHPA) provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and

culture." *54 U.S.C. Section 440(f).* The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included", or "eligible for inclusion" in the National Register of Historic Places. *Id.* In the absence of a programmatic agreement such as the NPA, the NHPA is implemented through a complex regulatory scheme (the Section 106 process), which requires federal agencies to collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate adverse effects. *See 36 C.F.R. Part 800.*

The NHPA sets forth two distinct requirements with regard to Tribal Nations. First, the NHPA obligates a Federal agency to evaluate its undertakings for their impact on Tribal historic properties. *54 U.S.C. 470a(d)(6)(A).* In carrying out this obligation, a Federal agency would, in most cases, need to secure the cultural and religious expertise of any Tribal Nation whose historic property could be affected in order to properly evaluate the impact of that undertaking on that Tribal Nation's historic property.

Second, a Federal agency is obligated to seek official Tribal views on the effect of an undertaking, a distinct exercise from securing the Tribal Nation's cultural and religious expertise for evaluating the impact of an undertaking. Specifically, the NHPA provides that federal agencies "shall consult with any Indian Tribal Nation and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. 54 U.S.C. Section 470a(d)(6)(B) (emphasis added). The NHPA Tribal consultation requirement applies broadly to traditional religious and cultural properties of Native Americans and Native Hawaiians, and makes no distinction with respect to Tribal religious or cultural properties located on or off Tribal lands.

Of course, general principles of Federal Indian law recognize Tribal sovereignty, place Tribal-US relations in a government-to-government framework, and establish a Federal trust responsibility to Indian Tribal Nations. These general principles are rooted in such sources as the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, [1] the American Indian Religious Freedom Act, [2] and the Archaeological Resources Protection Act[3]), Presidential Executive Orders (including Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regulations, and case law, as well as the Advisory Council on Historic Preservation's policy

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1 Pub. L. No. 101-601, Section 2, 104 Stat. 3048 (1990)(codified at 25 U.S.C. Sections 3001-13 (Supp. III 1991).

2 Pub. L. No. 95-341, Section 1, 92 Stat. 469 (1978)(codified at 42 U.S.C. Section 1996 (1988).

3 Pub. L. No. 96-95, Section 2, 93 Stat. 721 (1979)(codified at 16 U.S.C. Sections 470aa-70mm (1988).

statement *The Council's Relationship with Indian Tribal Nations* and the FCC's *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribal Nations.*

The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian Tribal Nations or individual Indians. See *Alaska Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) ("the general rule [is] that statutes passed for the benefit of the dependent Indian Tribal Nations or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973).

Consistent with these principles, the National Historic Preservation Act should be read broadly to support and protect Tribal interests.

In sum, the NHPA[4] is the main federal statute establishing policies and authorizing programs to support the preservation of places that are significant in American history. Many places that Seminole Nation of Oklahoma (SNO) regard as sacred are also of historic significance. If a place to which a Tribal Nation attaches religious and cultural significance is eligible for the National Register of Historic Places, then NHPA section 106 provides a process through which Federal agency officials are required to consider effects on such places and to consult with Seminole Nation of Oklahoma (SNO) on ways to avoid or mitigate any adverse effects.

> NHPA Section 106 establishes a review process for all Federal and Federally assisted undertakings,[5] requiring agencies to consider the effects of any undertaking on any historic property and to afford the ACHP an opportunity to comment. 54 U.S.C. § 306108. The

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[4] The NHPA was originally enacted in 1966, Pub. L. No. 89-665, and has been amended many times. Formerly codified at 16 U.S.C. § 470 *et seq.*, Pub. L. No. 113-287 (Dec. 19, 2014) changed the U.S. Code designation of the NHPA from title 16 to the new title 54. 54 U.S.C §§ 300101-307107. In this memorandum, references to numbered sections of the NHPA refer to designations in the public law as amended prior to the 2014 revision of the codification, which made extensive changes in the organizational structure of the statute, as well as some minor, non-substantive changes in wording.

[5] As defined in the statute:

> [T]he term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—
>
> (1) those carried out by or on behalf of the Federal agency;
>
> (2) those carried out with Federal financial assistance;
>
> (3) those requiring a Federal permit, license, or approval; and
>
> (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 300320.

section 106 process is carried out pursuant to implementing regulations promulgated by the ACHP. 36 C.F.R. Part 800.[6] The NHPA and the section 106 process have become vital procedures for Tribal cultural preservation and the protection of sacred, cultural, and traditional sites and resources. All too often, however, the section 106 process is short-circuited by summary conclusions that Tribal sites, properties, and resources are unaffected. The section 106 process is of critical importance. Infrastructure projects must faithfully hew to the requirements of this process and fulfill the spirit of the law—particularly when those procedural steps are part and parcel of meeting the trust responsibility.

The FCC Model: Regional Mapping and Tribal Impact Evaluation

The Tower Construction Notification System through the FCC is known as the model for mitigating historic preservation concerns and infrastructure development in Indian Country in a streamlined process. Allowing for Seminole Nation of Oklahoma (SNO) to work directly with applicants can allow for expedited review by bringing in the FCC for consultation as a final step. However, it is vitally important to note that this system does not absolve the FCC of its trust and consultative responsibilities.

In August 2000, the ACHP established a Telecommunications Working Group to provide a forum for the Federal Communications Commission (FCC), the ACHP, the National Conference of State Historic Preservation Officers (Conference), individual SHPOs, THPOs, Tribal Nations, communications industry representatives, and interested members of the public to discuss improved section 106 compliance and to develop methods of streamlining the section 106 review process. This working group was necessary because, despite Federally-mandated consultation requirements, literally tens of thousands of cell towers had been constructed across the United States with virtually no effort by the FCC, which licenses transmission from these towers, to consult with Tribal Nations. The number of towers was going to increase dramatically in the coming years and it was clear that the FCC needed to identify an effective mechanism for seeking Tribal input, while not diluting the FCC's consultation obligation to Tribal Nations.

In these discussions, Seminole Nation of Oklahoma (SNO) acknowledged that the construction of a universal wireless telecommunications infrastructure network was vital to the economic and social future of the United States. However, Seminole Nation of Oklahoma (SNO) strongly maintains that the Tribal interests at issue were also vital both to Seminole Nation of Oklahoma (SNO) and to the United States in terms of its historic preservation goals and its identity as a nation of diverse and vibrant peoples and cultures.

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[6] The authority of the ACHP to promulgated regulations implementing section 106 was enacted in NHPA section 211. 54 U.S.C § 304108.

As explained in greater detail below, out of these discussions a nationwide Programmatic Agreement was promulgated and the FCC implemented a system that provides for:

- early notification to Seminole Nation of Oklahoma (SNO) with regard to proposed cell tower sites;
- voluntary Tribal–industry cooperation to address Tribal concerns;
- recognition of the appropriateness of the industry paying fees to Seminole Nation of Oklahoma (SNO) for their special expertise; and
- affirmation of the FCC's ultimate obligation to consult with Seminole Nation of Oklahoma (SNO) as requested or necessary.

This system has been in place for over a decade and has expedited the communications infrastructure build-out and dramatically eased the FCC's need to consult with Seminole Nation of Oklahoma (SNO) on individual projects by providing a mechanism for the industry to work directly with Seminole Nation of Oklahoma (SNO) to address Tribal concerns before FCC consultation would have to be invoked.

Initial FCC Missteps—An Attempt to Delegate FCC's Consultation Obligation

In a belated attempt to make up for past errors, the FCC at one point stated that it had delegated its consultation obligations to the cell tower companies, which subsequently began sending letters to Seminole Nation of Oklahoma (SNO) demanding information, some of it very sensitive in nature, and asserting that if the information was not provided within a certain timeframe, usually 10 to 30 days, "[w]e will presume that a lack of response … to this letter will indicate that the [Tribal Nation] has concluded that this particular project is not likely to affect sacred Tribal resources."[7] Tribal Nations received hundreds and even thousands of such letters. The letters frequently referred to the Tribal Nations as "organizations" or "groups" and generally provided insufficient information on the location and nature of proposed sites for a proper evaluation.

The principal rationale for devolving section 106 responsibilities to the cell tower companies was to address the practical difficulty of the FCC complying with section 106's mandates for thousands of towers. However, it was unlawful for the FCC to delegate its government-to-government consultation obligations to a private entity. The FCC eventually acknowledged this and has repeatedly affirmed that the consultation obligation remains with the FCC, even if mechanisms are put in place for Seminole Nation of Oklahoma (SNO) to address issues of concern directly with the communications industry.

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[7] *See generally* Environmental Auditors of America, Inc. letters to various Tribal Nations and Tribal organizations that are available for public review on the FCC's website.

In the deployment of small cell across the country, the FCC must not repeat this mistake and is obligated to dutifully and meaningfully consult with Seminole Nation of Oklahoma (SNO) directly. While Seminole Nation of Oklahoma (SNO) is most concerned with federal undertakings, including telecommunications infrastructure that moves dirt, the deployment of small cells can impact Tribal historic properties (such as viewsheds). Additionally, Seminole Nation of Oklahoma (SNO) has significant concerns regarding collocating on existing rights-of-way and other properties that have never been subject to the 106 Tribal review process.

Establishment of the Tower Construction Notification System (TCNS)—Assuring Notice to Seminole Nation of Oklahoma (SNO) through Comprehensive Mapping of Tribal Areas of Concern

In order to efficiently connect industry with Tribal Nations, the FCC established a database and invited Seminole Nation of Oklahoma (SNO) to enter their respective geographic areas of interest. The FCC has indicated that every Federally recognized Tribal Nation in the United States participates in this database. The FCC then asked industry to submit notifications of proposed tower construction sites to the same database.

With Tribal areas of interest established in the database, the FCC is able to match industry's proposed sites with those areas of interest to particular Tribal Nations. The FCC then notifies the company and the affected Tribal Nation(s) and, as a result, Tribal Nations have early notification and the parties can communicate directly about any Tribal concerns. When a Tribal Nation signs off on a site as not being of concern or has worked out its concern with the company, *then the company can proceed and FCC consultation is not invoked.* This system allows for early notification and resolution of concerns before there is harm to Tribal cultural property. For industry, it provides the opportunity to have a site properly evaluated by Tribal experts who possess unique expertise, while also achieving an approval that assures compliance with the requirements of section 106.[8]

Addressing Tribal Resource Needs—Allowing Fees for Tribal Services in Response to Industry Requests

Early on, before the establishment of the TCNS, cell tower companies had, with few exceptions, been unwilling to pay fees to cover Tribal costs despite the onerous workload involved in responding to letters from industry. The companies argued that Tribal Nations should provide this information as a free government service.[9] Of course, it is common for Federal agencies, including

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[8] *See generally* http://wireless.fcc.gov/outreach/index.htm?job=tower_notification.

[9] If the Tribal Nation had a THPO program, then the Tribal Nation's participation as covered by the Tribal Nation's meager grant from the National Park Service.

the FCC, as well as other types of experts to charge reasonable fees for their services. Without a Tribal Nation's unique expertise in its cultural and religious history, it is impossible for cell tower companies to properly evaluate the historic significance of a proposed site or its potential impact on properties of cultural and religious significance to the Tribal Nation. Accessing this Tribal expertise to benefit a commercial enterprise is a wholly separate issue from a Tribal Nation invoking its right to consult with the FCC. Even as the cell tower companies willingly paid their engineers, environmental consulting firms and others, Seminole Nation of Oklahoma (SNO) argues that they should likewise be compensated for their expertise on a reasonable basis. The companies, which stood to profit greatly from these towers, were obviously the appropriate party to bear the cost of Tribal expert review.

The FCC acknowledged the appropriateness of such fees in its regional model *Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act*.[10] In those Best Practices, the FCC stated in a section entitled "Compensation for Professional Services":

> The Advisory Council regulations state that the "agency official shall acknowledge that Indian Tribal Nation and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." (§ 800.4(c)(1)). Consistent with the ACHP Memorandum on *Fees in the Section 106 Review Process*, payment to a Tribal Nation is appropriate when an Agency or Applicant "essentially asks the Tribal Nation to fulfill the role of a consultant or contractor" when it "seeks to identify historic properties that may be significant to an Indian Tribal Nation, [and] ask[s] for specific information and documentation regarding the location, nature and condition of individual sites, or actually request[s] that a survey be conducted by the Tribal Nation." In providing their "special expertise," Tribal Nations are fulfilling a consultant role. To the extent compensation should be paid, it should be negotiated between the Applicant and the Tribal Nation.[11]

Overall, the Best Practices state that they were specifically designed to:

- Facilitate the Commission's compliance with its obligations under the NHPA;

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[10] These Best Practices were specifically developed in discussions with the United South and Eastern Tribal Nations, Inc., which represents 26 Federally recognized Tribal Nations in the south and eastern portions of the United States.

[11] *Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act* at 12 (Oct. 25, 2004), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf.

> • Facilitate Applicants' compliance with their obligations under the Nationwide Programmatic Agreement and the Commission's rules;
>
> • [E]nsure that Tribal interests in the preservation of properties of religious and cultural significance to the [Tribal Nations] listed in or eligible for listing in the National Register are identified and taken account of early in the process of siting communications facilities;
>
> • Address the needs of the Applicant in a cost-effective and efficient manner and encourage the expeditious development of wireless communications infrastructure networks that are vital to the economic and social future of the United States;
>
> • Expedite [Tribal] review of proposed tower and antenna siting's; and
>
> • Establish a process that will facilitate Commission Applicants' obtaining access to the special expertise held by [Tribal Nations] in the identification, evaluation, and assessment of impacts on properties of cultural or religious significance to [Tribal Nations] that are listed in or eligible for listing in the National Register.[12]

Between the nationwide Programmatic Agreement and the *Best Practices* guidance, the FCC implemented a system that met these goals and has expedited the build-out of the country's communications infrastructure. Our organizations insist upon their continued use during any wireless build out.

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[12] *Id.* at 2.

Comments on Draft Notice of Proposed Rulemaking

Timing and Delays of Tribal Review

In the draft NPRM, both the wireless industry and the Commission cite delay in the Tribal review of proposed sites as a significant impediment to wireless deployment. We agree that reasonable timelines and deadlines should be adhered to. It is important to note, however, that the experiences of Seminole Nation of Oklahoma (SNO) with the review process are absent from this document which focuses solely on the views and experiences of Industry. We are aware that many Tribal Nation Historic Preservation Offices adhere to strict timelines as they respond to applicant requests for review. From the perspective of many Tribal Nations, it is the receipt of incomplete packets most often causing delays. For example, several USET SPF member Tribal Nations have reported that while many Tribal Nations list their requirements for review within TCNS, applicants often do not provide the necessary information or delay in providing it; on the other hand, other USET SPF Tribal Nations describe often developing excellent relationships with some representatives of applicants (generally, the archaeological consulting firms), who quickly come to know what particular Tribal Nations need and provide it in a timely fashion. While applicants seek to hold Tribal Nations accountable to these timelines, applicants must also be held to the same degree of accountability.

In addition, we note that the USET Best Practices provide a process that includes predictable timelines for both Tribal Nations and applicants. Although these best practices have only been endorsed and implemented by USET member Tribal Nations, they provide a starting point for further Tribal consultation on this matter. Tribal Nations urge the Commission to initiate Tribal consultation on the Best Practices in pursuit of adoption by additional Tribal Nations, as it seeks solutions to the issues raised by industry.

Costs of Tribal Review

As was mentioned earlier in this comment, before the establishment of the TCNS, cell tower companies had, with few exceptions, been unwilling to pay fees to cover Tribal costs despite the onerous workload involved in responding to letters from industry. The companies argued that Tribal Nations should provide this information as a free government service.[13]

Of course, it is common for Federal agencies, including the FCC, as well as other types of experts to charge reasonable fees for their services. Charging fees for government services is a well-

[13] If the Tribal Nation had a THPO program, then the Tribal Nation's participation as covered by the Tribal Nation's meager grant from the National Park Service.

practiced and common part of working with governments in America. As sovereign governments, it is appropriate for Tribal Nations to assess reasonable fees for reviewing industry applications.

Without a Tribal Nation's unique expertise in its cultural and religious history, it is impossible to properly evaluate the historic significance of a proposed site or its potential impact on properties of cultural and religious significance to the Tribal Nation. 36 CFR 800.4(c)(1) recognizes that Tribal Nations have "special expertise" in the evaluation of sites of importance to them. Indeed, Tribal Nations have unique expertise that is not replicable by individuals outside the Nation. Like access to engineering, environmental, architectural and other expertise, access to Tribal expertise should be compensated at a fair rate.

Accessing this Tribal expertise to benefit a commercial enterprise is a wholly separate issue from a Tribal Nation invoking its right to consult with the FCC. Industry applicants may confuse the Government's Section 106 consultation obligations as their own when navigating Tribal fees through the TCNS Process. In accordance with the federal trust responsibility, consultation occurs between two governments only: Tribal Nations and the Federal Government of the United States. Industry applicants seeking to use government expertise for government services is not consultation. Since wireless telecommunications companies are not governments and do not have a trust responsibility to Tribal Nations, they do not and cannot conduct consultation.

As sovereign governments, Tribal Nations determine for themselves what reasonable costs are for providing government services, in this case reviewing the impacts to historical and cultural of wireless infrastructure. Just as each state may determine and assess fees for government services on an individual basis, the same should be recognized for sovereign Tribal Governments.

We are aware that the actions of few Tribal Nations may be driving this conversation in a way to impact all Tribal Nations. If the FCC believes one Tribal Nation to be charging exorbitant fees, it is the responsibility of the FCC to work with that individual Tribal Nation to remedy the situation. Changing policy as a reaction to a small number of Tribal Nations at the detriment to all Tribal Nations sets a dangerous precedent for the Commission in addition to being contrary to the Commission's trust responsibility to work in the best interest of all Tribal Nations.

While we understand that the costs associated with Tribal review are at the forefront of this notice, our organizations defer to the opinions on individual Tribal Nations when commenting on fee schedules, flat fees, and differing fees for varying types of infrastructure.

Areas of Interest

The draft NPRM seeks comment on Tribal Areas of Interest in the TCNS. Applicants seem concerned that working with multiple Tribal Nations is more difficult than working with one. The

Commission also seeks comment on requiring a form of certification for areas of interest and how to move forward if a Tribal Nation does not certify their heritage.

Since 1492, Tribal Nations within what is now the United States have, as a group, lost 98% of their aboriginal land base. Today, as a result, the overwhelming majority of Tribal properties of cultural and religious significance are located off Indian Reservations and Federal trust lands. Prior to the establishment of the United States, Seminole Nation of Oklahoma (SNO) traveled great distances throughout the country. Their traditional homelands stretched much farther than the reservations that Seminole Nation of Oklahoma (SNO) inhabit today. Many Tribal Nations in the eastern region of the United States were removed by the Federal Government to live in Indian Territory, now called the state of Oklahoma, thousands of miles away from their original homelands. The intent of the National Historic Preservation Act was to protect the historical and cultural properties of Tribal Nations outside of the confines of their reservations, on all areas that their Tribal Nations determine to have cultural and historical heritage. This includes areas along the "Trail of Tears" and other removal routes in the southern United States.

Since the inception of the TCNS over a decade ago, Tribal Nations across the country have been more active where their ancestors called home. This can be attributed to a variety of developments including changes in technology, historic preservation techniques and research, and enhanced capacity due to economic development throughout Indian Country. Because of recent economic gains, many Tribal Nations have been able to prioritize historic preservation for their communities for the first time. In doing so, they have the resources to be more active in the geographic localities where they once resided. It is important for the Commission and Industry applicants to not view Indian Country as static and never changing. Just as economic development, technology and the internet has changed the work of the FCC, it has changed the work of historic preservation for Tribal Nations.

Certifying Areas of Interest

The Commission asks if Tribal Nations should provide a form of certification for areas of interest. Asking Tribal Nations to quantify culture and provide documentation when attempting to protect historic and cultural properties rejects Tribal Sovereignty and the history of government to government relations between the US and Tribal Nations.

If the Commission has reason to believe that an individual Tribal Nation is expanding their area of interest in an unreasonable way to take advantage of the TCNS system, it is the duty of the FCC to remedy the situation directly with that individual Tribal Nation. Forcing all Tribal Nations to certify their culture and heritage when attempting to protect their own cultural properties, is not the proper remedy. The FCC has an obligation to make the TCNS a system that works, and that requires working with Tribal Nations individually to ensure the best outcomes for all parties.

Multiple Tribal Reviews for a Single Application

The FCC asks when it is necessary for an applicant to compensate multiple Tribal Nations for the same project and whether there are mechanisms to gain efficiencies to ensure that duplicative review is not conducted by each Tribal Nation.

Recognizing individual sovereigns is the responsibility of the FCC. The historic preservation concerns of one Tribal Nation cannot and should not be considered the same historic preservation concerns of another Tribal Nation. Tribal Nations are sovereign governments, permitted by statute to consult on the impacts to historic and cultural properties. Each individual Tribal Nation has a unique history and culture, and the federal government must acknowledge this.

The FCC has a trust responsibility to each of the 567 Tribal Nations in America. Limiting Tribal input out of concern for industry convenience, as described in the draft NPRM, is a violation of the FCC's trust responsibility.

When it comes to questions of duplicative review, each Tribal Nation is entitled to their own distinct review of each new application. This means that if two or more Tribal Nations review one application under Section 106, there is no duplication because each has is its own government. Again, it is important for the Commission to recognize that the historic preservation concerns of one Tribal Nation are not the same of another, leaving no room for duplicative review. If Tribal Nations collaborate on receiving projects, then that is the purview of those Tribal Nations and those Tribal Nations only.

Applicant Self-Certification

With respect to Tribal Nations and Native Hawaiian Organizations, the Commission seeks comment on whether the process can be revised in a manner that would permit applicants to self-certify their compliance with Section 106.

NCAI and USET SPF strongly oppose revisions that would allow applicants to self-certify Section 106 compliance. In fact, the National Historic Preservation Act seeks to prevent this very phenomenon. We remind the Commission that the trust responsibility lies only between the federal government and Indian Tribal Nations. The role of the Commission is to protect the varied interests of historic preservation of Tribal Nations to which it is a trustee. Allowing for applicants to self-certify compliance is in direct violation of the National Historic Preservation Act and the Trust Responsibility the government has to Tribal Nations. As a branch of the Federal Government, the Commission's role, as defined by numerous court cases and statues, is to protect the interests of Tribal Nations from these situations, not assist industry in breaking the law or changing the regulatory process to suit industry's financial interests.

In addition to being against the spirit of the law, self-certification will embolden industry bad actors and result in a dramatic increase in requests for FCC intervention. Tribal Nations have expressed their concerns regarding some members of the wireless industry not working in good faith with Tribal Nations. In relying on industry's interpretation of compliance, the Commission will be called in for direct consultation by Tribal Nations more often, thus straining FCC resources and undermining the gains made through the TCNS system.

Setting up a system to allow applicants to self-certify their section 106 compliance could lead to legal ramifications and the potential for lawsuits against the Commission.

Rights of Way (ROW)

The Commission asks for comment on whether NHO and Tribal Nation participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties.

To understand why tribal review of applications in Right of Ways is important, we need to examine the history and geographies of Tribal Nations before Rights of Way existed. American Indians and Alaska Natives were nomadic people who would travel often based on the seasons, food sources, weather, and for many other reasons. The way of life was fluid throughout the land that is now the United States and heavily trafficked trails were established. These trails connected population centers, provided easy access to bodies of water and paths to cross mountain ranges. These trails that were blazed by American Indians and Alaska Natives were the obvious choice for colonists and settlers to use as roads, trails and later highways. The path of least resistance across America had already been established by the first Americans.

The first rights of way were granted to railroad companies in 1899 as rails lines were built across Indian lands. Later, the network of tribal trails and routes was used to establish state, local, and Interstate Highway Systems, as well as for infrastructure development and pipelines to transport oil, gas and other natural resources from tribal lands.

The earliest rights of ways were often granted without the permission of the local Tribal Nations. For instance, when construction of the Interstate Highway System started in 1956, Tribal Nations were not consulted even though the high ways was a federal undertaking with impacts to tribal cultural and historic properties. Because American Indian and Alaska Native life was concentrated on these routes, many historic, cultural and archeological properties exist in Rights of Way. Rights of Way have the potential to harbor the most cultural and historic properties protected by the National Historic Preservation Act. The Commission should consider this high concentration of historic and cultural properties when determining exclusions for Rights of Way.

The National Historic Preservation Act was passed in 1966, protecting Tribal historic and cultural properties and human remains, including properties found in Rights of Way. When constructing the Interstate Highway System prior to passage of the NHPA and other laws, the Federal government did not consult with Tribal Nations. Thus, existing rights of way cannot and must not be excluded from review under Section 106. The law is clear that any new federal undertaking must go through the Section 106 process and allow for tribal consultation.

The Commission asks is NHO and Tribal Nations participation should continue to be required if an exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties. Because the Commission is looking to permit new federal undertakings on known historic properties, by law, the Commission needs to consult with tribes. If there is an exclusion for deployment in this draft notice of proposed rulemaking where tribal involvement is most critical, it is in the discussion of rights of way.

Seminole Nation of Oklahoma (SNO) is deeply concerned that the Commission seeks comment "on whether to amend the current right of way exclusion to apply regardless of whether the right of way is located on a historic property." This is in direct conflict with the National Historic Preservation Act

Collocations

Tribal Nations, under Section 106, can consult with the Federal Government on new federal undertakings. Collocations are considered a federal undertaking because they transmit federal spectrum. The nature of collocations is different than other exclusions noted in this Notice.

Collocations can affect cultural and historical properties though disturbing view sheds. The cultural and spiritual traditions of Seminole Nation of Oklahoma (SNO) across the United States frequently involve the uninterrupted view of a particular landscape, mountain range, or other view shed. Collocations could disrupt these types of religious practice.

Because collocations are added to existing infrastructure that has already gone through the Section 106 process and Tribal Review, they may pose less potential harm to historic and cultural properties protected by law. Seminole Nation of Oklahoma (SNO) is most concerned with federal undertakings that disturb the ground and turn up dirt. However, the Commission still has an obligation to consult with Seminole Nation of Oklahoma (SNO) on collocations and on any exclusion regarding collocations. Of the 567 Tribal Nations in the US, there are may be 567 opinions on the potential effects of collocations on historic and cultural properties. This is why it is so important for the Commission to consult on major changes in policy directly with Indian Tribal Nations. One Tribal Nation may view collocation exclusion favorably while another may not.

SEMINOLE NATION RESPONSE TO FCC NPRC 17-79 – FINAL

Possible Alternative for Streamlining Collocation Review- Government to Government consultation

We suggest that the Commission work directly with individual Seminole Nation of Oklahoma (SNO) to come to an agreement on collocations. If a tower has already been found to have no effects to Tribal historic and cultural properties, and an applicant wishes to collocate on that same tower, without any new ground disturbance, the FCC should work with the Tribal Nation to find agreement on which towers or buildings the Tribal Nation would no longer like to review. This would satisfy Industry by allowing for known areas or towers that can be developed without the involvement of the Tribal Section 106 review, after the Tribal Nation has agreed with the FCC that it has no interest in that tower or area. We understand that the FCC prefers to have Industry work out issues with Seminole Nation of Oklahoma (SNO) first, but with the process of finding exclusions; the government to government relationship trumps the Commission's preference to defer to Industry.

Collocations on Twilight Towers

The existence of Twilight Towers is an example of the FCC not upholding their trust responsibility to Tribal Nations. We understand the history that allowed for Twilight Towers and understand why the Commission seeks comment regarding collocations on Twilight Towers. Towers, whether they were built between 2001 and 2005 or after 2005, have the same probability to impact to disturb and affect cultural and historic properties. Twilight Towers have affected Seminole Nation of Oklahoma (SNO) and the FCC has been informed repeatedly about these occurrences. Seminole Nation of Oklahoma (SNO) should be allowed to review these towers, and future collocations on them for impacts to historic and cultural properties.

Again, collocations, whether on twilight towers or regular towers, can impact view sheds and other historic and cultural properties.

Allowing for Seminole Nation of Oklahoma (SNO) to review collocations on Twilight Towers is an opportunity for the FCC to make up for its lack of upholding the trust responsibility. The FCC could implement an option in TCNS to allow for Seminole Nation of Oklahoma (SNO) to review Twilight Towers. After thorough historic preservation review, these towers could be considered an approved tower and no longer a Twilight Tower and be eligible for collocation.

Conclusion

Seminole Nation of Oklahoma (SNO) is deeply concerned with the proposed policy changes contained in the NPRM. Not only do these changes have the potential to harm a largely functional

Tribal review process and Tribal culture resources, they run counter to the intent of various laws, including the National Historic Preservation Act.

Seminole Nation of Oklahoma (SNO) strongly urge the Federal Communications Commission not to proceed with this draft Notice of Proposed Rulemaking and to avoid taking further action on these dockets.

In the event that the Commission does move forward with this draft Notice of Proposed Rulemaking, the Commission must conduct government to government consultation with Tribal Nations across the Country. It is the Commission's obligation to the United States' 567 Tribal Nations to consult on any major changes to Federal Government processes that impact Tribal Nations. Thus far, the Commission has not conducted consultation in any form with Tribal Nations on this topic.

Respectfully,

Lewis J. Johnson
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